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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 598

PEOPLE OF THE STATE OF MICHIGAN By JOHN S. HAGGERTY, Secretary of State,

Petitioner,

v.

MICHIGAN TRUST COMPANY, Receiver of Worden Grocer Company,

Respondent:

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BENJAMIN P. MERRICK,
Counsel for Respondent.

(36,412)

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MICHIGAN TRUST COMPANY, Receiver of Worden Grocer Company, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Reference to Opinion of Lower Court.

The decision of the Circuit Court of Appeals for the Sixth Circuit, review of which the petitioner seeks, was handed down October 8, 1931, in the case of *Michigan Trust Company* v. *People of State of Michigan,* 52 F. (2d) 842. The opinion appears in the record (R., 34).

II.

Jurisdiction.

We admit that the petition is authorized by Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat., 936, and that it is within the discretionary power of this court to issue the writ.

III.

Scope.

Inasmuch as the granting or denial of the petition is a matter of sound judicial discretion, we shall merely summarize herein our comments upon the petition and the brief in support thereof, and our reasons for suggesting that the petitioner's prayer should be denied.

The validity of the decision of the Circuit Court of Appeals for the Sixth Circuit is not properly before this court at this time; and hence we shall not now make reply to the argumentative attack upon that decision which is contained in the petitioner's brief (pp. 25-31).

IV.

Corrective Statement of the Case.

The only matter for the court's present consideration is whether, taking into consideration the nature of the question involved, the decision of the lower court and other judicial decisions alleged to be in conflict therewith, special and important reasons for granting the Writ of Certiorari may be said to exist (Par. 5 of Rule 38).

Reference to the first and last paragraphs of the opinion of the lower court (R., 34, 39) will disclose a concise statement of the controversy and of the decision reached. Those paragraphs constitute a more helpful statement of the case than is to be found either in the petition (pp. 1-3) or in the supporting brief (pp. 13-14) wherein counsel for the petitioner refer in needless detail to the original bill of complaint; erroneously mention, as though proven, an allegation of no materiality in the proceedings below, namely, solvency of the corporation in receivership; and becloud their statement with argument.

The question of law presented to the court below, and by it decided in the negative, was this: Did the Michigan Trust Company, as receiver of the property and business of Worden Grocer Company, a Michigan mercantile corporation, appointed by the District Court of the United States for the Western District of Michigan upon a creditor's bill, and operating the business of the corporation by authority of the appointing court, become liable to the State of Michigan for annual privilege fees imposed upon the corporation by Section 4 of Act No. 85, P. A. 1921, for "the privilege of exercising its franchise and of transacting its business" within the State, and accruing against the corporation subsequent to the date of the receiver's appointment?

It may be noted, although of secondary importance, that in remanding the case to the District Court, the Circuit Court of Appeals decreed that if there should be a surplus distributable to stockholders, that fund alone would be chargeable with the payment of the State's claim for franchise taxes (R., 37).

V.

Argument.

1. *Rationale of Decision, Review of Which is Sought.*

The court below (1) based its decision upon the principle of general law that the operating receiver of a private

corporation does not exercise the corporate franchise; and (2) found sanction for that principle in the decision of this court in *United States* v. *Whitridge*, 231 U. S. 144, a case which arose under the Corporation Excise Tax Law of 1909, Sec. 38, Act of Aug. 5, 1909, 36 Stat., 112. Divergency of view as to the applicability of the stated principle in cases involving the question of state franchise tax liability of corporate receivers lies at the bottom of such conflict as may exist between judicial decisions in those cases. This is conspicuously illustrated (1) in the opinion handed down by the Michigan Supreme Court on June 1, 1931, in the case of *In re Detroit Properties Corporation*, 254 Mich. 524 (Petitioner's Brief, 32, 37-38), and (2) in the opinion of the lower court in the case at bar (R., 38-39). If this court concurs with the view of the lower court (R., 39) that the rationale of the decision in *United States* v. *Whitridge, supra*, applies in all its force to the present case, we suggest that the petition for the writ may properly be denied.

2. *Conflict Between Circuit Courts of Appeal.*

In citing in their petition (p. 4) and in their supporting brief (p. 10) five decisions of Circuit Courts of Appeal asserted to be in conflict with the decision of the court below, counsel overstate the extent of such conflict. Of the cases cited, the only one which is squarely in conflict with the decision of the court below is *People* v. *Hopkins*, 18 F. (2d) 731 (C. C. A. 2). Counsel's citation of *Ohio* v. *Harris*, 229 F. 892 (C. C. A. 6), is unfortunate (1) because the point decided in that case was that a non-operating receiver of an Ohio corporation was not liable for the recurrent state franchise tax accruing after the receiver's appointment; and (2) because the dictum in that case, to the effect that the receiver would have been liable had he operated the business, was expressly disapproved by the same court in the opinion rendered in the case review of which is now sought (R., 39). The other cases cited by counsel to show con-

flict between the Circuit Courts of Appeal, *Bright, et al.* v. *State of Arkansas,* 249 F. 950 (C. C. A. 8), and *McFarland, et al.* v. *Hurley, et al.,* 286 F. 365 (C. C. A. 5), were effectively distinguished by the court below in its opinion (R., 36-37).

It follows that counsel exaggerate in stating in their brief (pp. 11-12) that the court below admitted the "conflict of authority, by calling attention to the cases decided by the other Circuit Courts of Appeal" and that it dismissed them with the statement that they were not sound in reason and that the court felt under no obligation to follow them. The court will observe from the passage to which counsel refer, in the opinion of the lower court (R., 37-38), that aside from its own dictum in *Ohio* v. *Harris, supra,* (expressly disapproved in the opinion) the only decision of a Circuit Court of Appeals which the lower court considered comparable was *People* v. *Hopkins, supra,* which it disapproved and declined to follow.

3. *Conflict Between the Lower Court and the Michigan Supreme Court.*

That there is opposition between the decision of the court below and the earlier decision of the Michigan Supreme Court in the case of *In re Detroit Properties Corporation, supra,* must be admitted. The conflict, however, was not accidental, for the decision of the state court, although handed down subsequent to the argument and submission of the instant case in the court below, was considered at length and disapproved by the latter in its opinion (R., 34-36).

The divergence between the two decisions is upon a question of law of general application. The decision of the court below was not "a decision of an important question of local law" as counsel say in their brief (p. 10); rather was it a decision in which the court applied, to facts local to Michigan, a general principle of law which it deemed sound.

Again, it is not accurate to say, as counsel do in the brief (pp. 10-11), that the instant case involved "the right to collect taxes imposed under the laws of the State of Michigan". The tax was one admittedly imposed upon the corporation, for certain corporate privileges. The statute contained no reference to corporate receivers. The decision of the court below did not bring in question the right of the state to collect from any corporation the tax imposed upon it. Being of opinion, as previously pointed out, that the respondent receiver was not exercising the franchise, i. e. the thing taxed, the lower court held that the receiver was not subject to the tax thereon.

Finally, the lower court cannot properly be charged with having reached its decision by means of a construction of the statute at variance with that of the Michigan Supreme Court (Petitioner's Brief, 29). The lower court was quite correct in saying (R., 34, note) that no question of construction of a state statute by the highest court of the state was involved. Counsel are manifestly in error in their contention (Brief, 29) that the tax liability of the receiver depended on the nature of the tax, which they assert could only be determined by a construction of the statute. The lower court in fact adopted the view of the state court, expressed in *In re Detroit Properties Corporation, supra,* as well as in many earlier Michigan cases therein cited, that the tax is not a tax upon property but an excise upon the privilege (R., 34). The tax liability of the receiver did not depend upon a particular construction of the statute; it depended upon whether, as a matter of law, the receiver exercised and enjoyed the thing taxed. In reaching conflicting conclusions, neither court resorted to interpretation of the meaning of the statute, beyond that which is always necessary if the meaning of printed words is to be grasped. The case presents no basis whatever for invoking the rule of deference by Federal courts to state courts of last resort, in the interpretation of local statutes.

4. *No Important Question of Federal Law.*

The contention of counsel (Brief, 12) that the case at bar presents an important question of Federal law, not hitherto determined by this court, we deny. If by a "question of Federal law" they mean a question arising under the Constitution or laws of the United States, manifestly no such question is here involved. If they mean that this court has not passed upon the question of general law presented, as applicable to receivers of Federal courts, we answer (1) that if so, that fact alone would not justify the issuance of the writ unless the well-established limitations upon the right of review by certiorari are to be greatly relaxed, and (2) that in truth the basic principle here involved was settled by this court in *United States* v. *Whitridge, supra.*

5. *Conclusion.*

For the foregoing reasons we suggest that the petitioner has not shown special or important grounds for the granting of the Writ of Certiorari and that the petition should be denied.

Respectfully submitted,

BENJAMIN P. MERRICK,
Counsel for Respondent.